STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS,
HON. STEPHEN L. BORRELLO PRESIDING

SHIRLEY RORY and ETHEL WOODS,

Plaintiffs-Appellees,

v.

CONTINENTAL INSURANCE COMPANY, a CNA COMPANY,

Defendant-Appellant.

Docket No. 126747

Court of Appeals No. 242847

Wayne County Circuit Court
No. 00-027278-CK

/

AMICUS CURIAE BRIEF OF THE MICHIGAN TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFFS-APPELLEES

/

ROBERT B. JUNE (P51149)
LAW OFFICES OF ROBERT JUNE, P.C.
Attorney for Amicus Curiae,
Michigan Trial Lawyers Association
124 Pearl Street, Suite 201
Ypsilanti, Michigan 48197-5374
(734) 481-1000

I. TABLE OF CONTENTS

II. INDEX OF AUTHORITIES

Cases

Statutes

Rules

III. STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to MCR 7.301(A)(2).

IV. QUESTION INVOLVED

1. Did the Trial Court properly deny Defendant-Appellant's motion for summary disposition brought pursuant to MCR 2.116(C)(7) and MCR 2.116(C)(8), concluding that enforcement of the contractual one-year limitation period for uninsured motorist claims would be unreasonable?

Defendant-Appellant's Answer:	No.
Plaintiffs-Appellees' Answer:	Yes.
Trial Court's Answer:	Yes.
Court of Appeals' Answer:	Yes.
Amicus' Answer:	Yes.

V. STANDARD OF REVIEW

The Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. *Maiden v. Rozwood*, 461 Mich 109, 118 (1999). A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence. If such material is submitted, it must be considered. MCR 2.116(G)(5). Moreover, the substance or content of the supporting proofs must be admissible in evidence. *Id.* The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant. *Maiden*, at 119, citing *Patterson v Kleiman, 447 Mich. 429, 434, n 6; 526 N.W.2d 879 (1994).*

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Id.*, at 119. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Maiden, at 119.* A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.*, quoting *Wade v. Dep't of Corrections*, 439 Mich 158, 163 (1992). When deciding a motion brought under MCR 2.116(C)(8), a court considers only the pleadings. *Maiden*, at 119-120

VI. INTEREST OF AMICUS CURIAE

The Michigan Trial Lawyers Association is an organization of Michigan lawyers engaged primarily in litigation and trial work. Comprised of more than 2,000 attorneys, the Michigan Trial Lawyers Association recognizes an obligation to assist this Court on important issues of law that would substantially affect the orderly administration of justice in the trial courts of this state. This case presents one such issue.

VII. STATEMENT OF FACTS

Amicus adopts the statement of facts and proceedings presented by Plaintiffs-Appellees in their brief on appeal.

VIII. ARGUMENT

A. The Trial Court Properly Denied Defendant-Appellant's Motion For Summary Disposition Pursuant To MCR 2.116(C)(7) And (8), Concluding That Enforcement Of The Contractual One-Year Limitation Period For Uninsured Motorist Claims Would Be Unreasonable.

In this appeal, Defendant-Appellant Continental Insurance Company urges the Court to adopt a strict rule that a contractual limitation period must be enforced even if it is unreasonable to do so. We respectfully ask the Court to decline Continental's request.

There is no dispute that the parties to a contract may agree, within reason, to shorten the limitation period otherwise applicable to a cause of action. However, as a matter of public policy, Michigan courts have long established that it is unreasonable for a contractual limitation period to run before a claim properly accrues under the contract, potentially working a forfeiture that would render the rights of one of the parties nugatory. As the Court has aptly observed:

> Except in topsy-turvy land, you can't die before you are conceived, or be divorced before ever you marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a non-existent railroad. For substantially similar reasons, it has always heretofore been accepted, as a sort of legal "axiom," that a statute of limitations does not begin to run against a cause of action before the cause of action exists, i.e., before a judicial remedy is available to the plaintiff.
>
> *Moll v Abbott Lab*, 444 Mich 1, 12 n.15 (1993) (citations omitted).

In this case, the Court of Appeals properly recognized that a contractual one-year limitation period *running from the date of the accident* had the effect of terminating coverage before a cause of action for uninsured motorist benefits properly accrued under the Continental policy. This limitation would work a practical abrogation of Plaintiff's claim, barring the action before the covered loss could be ascertained, thus making it too unreasonable to be enforced.

The insured does not have a cause of action under the terms of the Continental policy unless he or she becomes legally entitled to recover compensatory damages from an uninsured motorist. An injury accident, alone, is not enough to trigger coverage or cause a claim to accrue. Yet the Continental policy purports to run the contractual limitation period from the date of the accident. There is nothing in the facts of the present case to suggest that Plaintiffs were dilatory in asserting their claims. They did not sit on their rights; they notified Continental promptly after learning that the tortfeasor who caused their injuries was not covered by insurance; and they filed suit promptly after Continental denied their claims. Continental does not claim actual prejudice. Continental merely asserts that the contractual limitation period expired before Plaintiffs brought their claims, even though Plaintiffs brought their claims as soon as they arose. In Continental's view, Plaintiffs' claims were extinguished before a judicial remedy existed. As Amicus Curiae, we urge the Court to reject Continental's position because it is unreasonable under the law.

The Court of Appeals' decision accords with a long history of Michigan jurisprudence in this area, and the refusal to enforce this type of unreasonable limitation period is neither new nor novel. To the contrary, Michigan courts have fashioned a variety of mechanisms for curing unreasonable limitation periods, including equitable tolling, declining to enforce notice limitations in the absence of actual prejudice, application of a discovery rule of accrual, and borrowing appropriate limitation periods from statutory sources. In this case, the Court of Appeals appropriately chose to borrow the three-year statute of limitations applicable to no-fault automobile tort actions as a means of curing the unreasonable limitation period contained in the Continental uninsured motorist contract. The Court of Appeals' decision was simply prudent.

Therefore, we now ask the Court to affirm the decision of the Court of Appeals and remand this action to the trial court for further proceedings.

1. **As A Matter Of Long-Standing Policy, Michigan Courts Construe Insurance Contracts In A Reasonable Manner To Avoid Forfeitures Arising From Failure Of A Beneficiary To Perform An Impossible Act.**

Although Continental argues that it is a new phenomenon for courts to evaluate the "reasonableness" of contractual limitation periods, this is actually a matter of long-standing policy in Michigan:

> While it is true, as Defendant contends, that courts will not write a new contract for the parties, they will construe insurance contracts in a ***reasonable*** manner so as to avoid forfeitures arising from failure of a beneficiary to perform an impossible act.
>
> *Lukazewski v Sovereign Camp of the Woodmen of the World*, 270 Mich 415, 419 (1935) (emphasis added).

The issue in *Lukazewski*, as in this case, was whether a contractual limitation period could be construed to extinguish a claim before the plaintiff had a proper opportunity to make it. The Court held that such a construction would be unreasonable, and on this basis, determined that the limitation period could not begin to run until the plaintiff's cause of action had accrued. *Id.*, at 422-23. This has been the law in Michigan ever since *Lukazewski* was decided in 1935.

The *Lukazewski* Court relied in part on the earlier decision of *Griffin v Northwestern Mutual Life Ins Co*, 270 Mich 185 (1930), which addressed the question of when a claim accrued under a life insurance policy. In *Griffin*, the insured wrote a letter to his wife on December 30, 1915, indicating that he had engaged passage on a boat traveling from New York to Boston, and other evidence corroborated this fact. *Id.*, at 186. The insured was never seen or heard from thereafter. *Id.*, at 187. Because the insured's wife, as beneficiary of the life insurance policy, could not affirmatively establish his death, she had to wait seven years to assert the statutory

presumption of death. *Id.* By that time, the six-year statute of limitations arguably had expired. *Id.*, at 188. The Court rejected this interpretation of the statutory limitation period, however, holding that:

> Her cause of action accrued after the expiration of the seven-year period following the disappearance of the insured. She might bring her action at any time within the statutory period of six years thereafter.
>
> *Griffin,* 279 Mich at 189, citing *McLaughlin v Aetna Life Ins Co*, 221 Mich 479 (1923).

In *Lukazewski*, the Court confronted a life insurance policy containing a contractual limitation that precluded lawsuit until 90 days after the receipt of proof of death and also required that "no suit might be brought upon the certificate unless commenced within one year from the date of death." *Lukazewski*, 270 Mich at 417. The insured had disappeared in May of 1925. The insured's sister, who was the beneficiary of the policy, made a "diligent but futile search for him." *Id.* In November of 1932, the insured's photograph was discovered in the Detroit morgue with records showing that his body had been found in an alley on June 22, 1925. *Id.*, at 418. When the beneficiary sued under the policy, the insurer defended on the basis of the one-year limitation period contained in the contract. *Id.*, at 419. The Court rejected this defense, remarking:

> Immediately upon ascertaining the fact of his death, [plaintiff] notified defendant. This was sufficient. It is not reasonable to suppose the parties intended that the one-year limitation upon the right to bring suit should begin to run in such a case prior to the time when the death of the insured was discovered by the beneficiary in the exercise of due diligence. The holder of the policy cannot ***reasonably*** be supposed to give proof of a fact of which he himself is ignorant through no neglect or carelessness on his part.
>
> *Lukazewski,* 270 Mich at 419 (emphasis added).

The *Lukazewski* Court concluded that the limitation period did not begin to run until the cause of action accrued, and "her cause of action did not accrue until she discovered the fact of the insured's death." *Id.*, at 423.

Our courts have since addressed and further developed this principle in a variety of contexts, most obviously in the area of torts that result in latent or hidden harm such that discovery of the cause of action is delayed. The discovery rule of accrual was applied to medical malpractice actions in 1973. *Dyke v Richard*, 390 Mich 739, 747 (1973) (malpractice action must be brought "within two years of the time when the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the asserted malpractice, whichever is later"). The Court reasoned that, in the absence of such a rule, the statute of limitation would become a statute of abolition with respect to any person who, exercising reasonable diligence, could not ascertain his or her right to bring a cause of action with the applicable limitation period. *Id.*, at 746-47. Based on like reasoning, the Court refused to enforce the limitation period against a claim for medical negligence brought 26 years after the negligent act occurred. *Chase v Sabin*, 445 Mich 190, 199-200 (1994).

Among others, the discovery rule of accrual has been applied by Michigan courts to: pharmaceutical product liability actions, *Moll v Abbott Lab*, 441 Mich 1, 13 (1993); asbestos liability claims, *Larson v Johns Mansville Sales Corp*, 427 Mich 301, 308 (1986); breach of warranty claims, *Southgate School Dist v West Side Construction Co,* 399 Mich 72, 82; (1976); negligent misrepresentation, *Williams v Polgar*, 391 Mich 6, 23-26 (1974); negligent construction action where damage is not readily apparent, *Filcek v Utica Bldg Co*, 131 Mich App 396, 400 (1984). The principle underlying each of these cases is that a plaintiff should not be deprived of a cause of action before the plaintiff could reasonably assert the cause of action, that

is, "before a judicial remedy is available to the plaintiff." *Moll, supra,* 441 Mich at 12 n.15. Rather, a cause of action generally does not accrue until "all of the elements of the cause of action have occurred and can be alleged in a proper complaint." *Connelly v Paul Ruddy's Equipment Repair & Service Co,* 388 Mich. 146, 150 (1972).

In following this axiomatic principle, Michigan courts have distinguished the time at which a cause of action accrues as a result of delayed harm from those cases where the time of accrual is delayed until the harm is discovered. The Court discussed this distinction in interpreting the statutory accrual provision of the Revised Judicature Act:

> In Michigan, the limitation period for ordinary negligence actions such as the case at bar is three years. MCL 600.5805(8); MSA 27A.5805(8). The most complicated problem associated with statutes of limitation, and the problem presented in this case, is that of determining when they begin to run. MCL 600.5805(8); MSA 27A.5805(8) provides that "the claim accrues at the time . . . the wrong upon which the claim is based was done regardless of the time when damage results." MCL 600.5827; MSA 27A.5827. We have held that the term "wrong," as used in the accrual provision, refers to the date on which the plaintiff was harmed by the defendant's negligent act, not the date on which the defendant acted negligently. *Connelly v Paul Ruddy's Equipment Repair & Service Co,* 388 Mich. 146 (1972). Otherwise, a plaintiff's cause of action could be barred before the injury took place.
>
> Another accrual problem associated with statutes of limitation occurs when a plaintiff is injured but is unaware of the injury. If the statute of limitation begins to run at the time of injury, it is possible that plaintiffs with perfectly valid claims could be prevented, through no fault of their own, from bringing their actions within the specified period of limitation. In situations such as these, the common law has developed equitable rules to mitigate the harsh effects of the statute of limitation. One such exception is the discovery rule. The discovery rule, based on principles of fundamental fairness, "was formulated to avoid the harsh results produced by commencing the running of the statute of limitations before a claimant was aware of any basis for an action." *Hammer v Hammer,* 142 Wis 2d 257, 264; 418 N.W.2d 23 (1987).
>
> *Stephens v Dixon*, 449 Mich 531, 534-35 (1995).

In other appropriate cases our courts have applied different equitable devices to ensure that limitation periods would not produce inequitable forfeitures. Where an applicable insurance policy required notice "as soon as practicable," for example, failure to give timely notice could be excused to the extent that the failure did not result in actual prejudice to the insurer. *Kennedy v. Dashner*, 319 Mich 491, 493-94, 501 (1947). Alternatively, an insurer may be equitably estopped from enforcing a limitation period, or the period may be tolled in some situations where the insurer's conduct has induced the insured to refrain from filing suit within the time required under the contract. *Turner v Fidelity & Cas Co of New York*, 112 Mich 425, 426-28 (1897); *The Tom Thomas Org v. Reliance Ins Co*, 396 Mich 588, 591-97 (1976).

Although different circumstances have produced different practical remedies, each of these cases relies on the bedrock policy of Michigan common law that a limitation period must afford the plaintiff a reasonable opportunity to bring a lawsuit after the cause of action properly accrues. As Justice Cooley explained with regard to statutory limitation periods:

> The general power of the legislature to pass statutes of limitation is not doubted. The time that these statutes shall allow for bringing suits is to be fixed by the legislative judgment, and where the legislature has fairly exercised its discretion, no court is at liberty to review its action, and to annul the law, because in their opinion the legislative power has been unwisely exercised. But the legislative authority is not so entirely unlimited that, under the name of a statute limiting the time within which a party shall resort to his legal remedy, all remedy whatsoever may be taken away.... **It is of the essence of a law of limitation that it shall afford a *reasonable* time within which suit may be brought** (citations omitted); and a statute that fails to do this cannot possibly be sustained as a law of limitations, but would be a palpable violation of the constitutional provision that no person shall be deprived of property without due process of law.
>
> *Price v Hopkin*, 13 Mich 318, 324-25 (1865) (emphasis added).

As the Court has addressed the propriety of contractual limitation periods applicable to different situations, it has synthesized this basic rule into the following formulation:

> Absent any statute to the contrary, the general rule followed by most courts has been to uphold provisions in private contracts limiting the time to bring suit where the limitation is ***reasonable***, even though the period specified is less than the applicable statute of limitations. *The Tom Thomas Organization, Inc v Reliance Ins Co,* 396 Mich 588, 592 (1976). See also *Barza v Metropolitan Life Ins Co*, 281 Mich 532, 538 (1937); *Turner v Fidelity & Casualty Co of New York,* 112 Mich 425, 427 (1897).
>
> ***
>
> The boundaries of what is ***reasonable*** under the general rule require that the claimant have sufficient opportunity to investigate and file an action, that the time not be so short as to work a practical abrogation of the right of action, and that the action not be barred before the loss or damage can be ascertained. (Citations omitted).
>
> *Camelot Excavating Co, Inc v St Paul Fire & Marine Ins Co*, 410 Mich 118, 126-27 (1981) (emphasis added).

The Court reinforced this three-part test in *Herweyer v Clark Highway Services, Inc*, 455 Mich 14, 19-20 (1997), which was followed in turn by the Court of Appeals in *Timko v Oakwood Custom Coating, Inc*, 244 Mich App 234, 239-40 (2001), and adopted as the guiding principle for the decision by the Court of Appeals below in this case:

> Generally, the terms of an insurance contract will be enforced as written when no ambiguity is present. *Morley* [*v Auto Club of Michigan,* 458 Mich 459, 465 (1998)]. However, where a contract provision shortens the otherwise applicable statute of limitations, the shortened period must be reasonable. In *Timko, supra,* the Court explained:
>
> > Parties may contract for a period of limitation shorter than the applicable statute of limitation provided that the abbreviated period remains reasonable. The period of limitation "is reasonable if (1) the claimant has sufficient opportunity to investigate and file an action, (2) the time is not so short as to work a practical abrogation of the right of action, and (3) the action is not barred before the loss or damage can be ascertained." *Herweyer* [*v Clark Hwy Services, Inc,* 455 Mich. 14, 20; (1997)], citing *Camelot* [*supra*, at 410 Mich at 127]. [*Timko,* 244 Mich. App. 239-240].
>
> *Rory v Continental Ins Co*, 262 Mich App 679, 683 (2004).

This principle is the refined product of more than a century of Michigan jurisprudence. It is not a newfangled derivation of the recently originated "doctrine of reasonable expectations" that was discussed briefly in dicta in *Bradley v Mid-Century Ins Co*, 409 Mich 1, 61 n. 69 (1979), and later discredited in *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51-63 (2003). To the contrary, the rule that a contractual period of limitation must be reasonable is exactly the type of public policy, ascertained from "definite indications in the law," that this Court has identified as sufficient to curb contractual power. *Terrien v Zwit*, 467 Mich 56, 61 (2002). The holding by the Court of Appeals in this case represents the proper exercise of judicial power: "to determine from objective legal sources what public policy *is*, and not to simply assert what such policy *ought* to be on the basis of the subjective views of individual judges." *Id.*, at 66. Since at least 1865, our courts have emphasized, in apt and certain terms, the policy that a contractual limitation period must be reasonable to be enforced in Michigan. *Price*, *supra*, 13 Mich at 324-25. As the *Terrien* Court has explained, when such "definite indications" are evident in the law:

> [P]ublic policy is the "foundation" of our constitutions, statutes, and common law.... It is precisely because of this truth that a contract that *does* violate public policy is unenforceable.
>
> *Terrien*, 467 Mich at 78.

In short, the freedom of private parties to contract has never included the right to impose an unreasonable limitation period that would work a practical abrogation of the contract cause of action, and the rule that a contractual limitation period must be reasonable to be enforced has long been embedded firmly in the common law of Michigan. *Lukazewski*, *supra*, 270 Mich at 419. Consequently, the Court of Appeals properly concluded that this rule should determine the outcome of the present case.

2. A Claim Does Not Accrue Under The Continental Policy Until An Insured Can Establish That He Or She Is Legally Entitled To Recover Compensatory Damages From Someone Identified As An Uninsured Motorist.

This case involves a contractual claim for uninsured motorist benefits under an insurance policy that reads in pertinent part:

INSURING AGREEMENT

We will pay compensatory damages which any ***covered person*** is legally entitled to recover from the owner or operator of an ***uninsured motor vehicle*** because of ***bodily injury***:

1. Sustained by any ***covered person***; and

2. Caused by an ***accident*** arising out of the ownership, maintenance, or use of an ***uninsured motor vehicle***;

Claim or suit must be brought within 1 year from the date of the ***accident***.

(Continental Uninsured Motorists Coverage Endorsement, Defendant-Appellant's Appendix, p. 7a.)

This is essentially a contract to indemnify the owner or operator of an illegally uninsured vehicle for the benefit of the insured. By statute, the applicable limitation period would normally be six years. MCL § 600.5807(8). The underlying negligence action for which Continental is providing indemnification has a statutory limitation period of three years. MCL § 600.5805(10). However, the Continental policy purports to shorten the limitation period for an uninsured motorist "claim or suit" to "1 year from the date of the accident."

The limitation provision is confusing to some extent because the Continental policy contemplates suit against the uninsured third-party tortfeasor as well as suit against Continental, but the limitation provision does not specify whether the "claim or suit" must be brought against

the tortfeasor or against Continental to satisfy the one-year limitation period. Furthermore, Continental has taken the position that the provision is satisfied by filing either a claim or a suit within the one-year period. Appellant's Brief, at 13, 18. Thus, it appears that the limitation period for filing suit would be extended to the statutory six-year limit under MCL § 600.5807(8) if the insured first filed a "claim" within the one-year contractual limitation period, but if no claim is filed first, then a lawsuit must be filed within one year after the accident. However, a different provision of the policy also requires the insured to sue the uninsured tortfeasor in the same suit as Continental, thereby shortening this six-year limitation to three-years pursuant to MCL § 600.5805(10). Appellant's Appendix, p. 9a, ¶ 2.a.(2)(a). Rejection of arbitration, or alternatively the failure of two arbitrators to agree on a third arbitrator, is a condition precedent to filing a lawsuit. Appellant's Appendix, p. 9a, ¶ 2.a.(2). If the lawsuit option is selected, then the insured must obtain a judgment that is "the final result of an actual trial," apparently contractually precluding the trial court from entering judgment pursuant to default or summary disposition proceedings, and Continental reserves the right to defend the uninsured motorist at trial. Appellant's Appendix, p. 9a, ¶¶ 2.a.(2)(c) and (3).

Before any of this can proceed under the terms of the insurance contract, of course, the insured must have an accrued cause of action against Continental. An action for indemnification under an insurance contract generally "does not accrue until liability is legally imposed" against the indemnitee. *Beck v Westphal*, 141 Mich App 136, 142 (1984). It is for this reason that an adjudication against the uninsured motorist would not apply against Continental under the doctrine of *res judicata. Id.*

Indeed, just as the parties may shorten the limitation period by contract, they also may delay the accrual of a claim through contract language. *Traverse City State Bank v Ranger Ins*

Co, 72 Mich App 150, 153 (1976); *Smith v Allstate*, 102 Mich App 473, 475 (1980). In this case, the insuring agreement states that Continental is obligated to pay "compensatory damages which any covered person is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of bodily injury." Construed strictly in accordance with *Smith*, this would mean that a claim against Continental would not accrue until judgment entered, legally entitling the insured to recover compensatory damages from the uninsured motorist. As the *Smith* panel observed with regard to the contract at issue in that case:

> This section of the insurance contract specified the event which started the running of the statutory limitation period. There was no obligation to pay the insured until a judgment was rendered. The statute of limitations, therefore, did not begin to run until August 28, 1978. The trial court erred in ruling that the statutory period commenced on the date of the incident upon which the liability was based. Since the suit was brought within the six-year statutory period, defendant's motion for accelerated judgment was improperly granted.
>
> *Smith*, 102 Mich App at 475.

Such a strict construction seems unworkable in this context, but at the very minimum a claim cannot accrue under the Continental contract until the insured has some definite reason to believe that he or she may be legally entitled to recover compensatory damages from a motorist who has been identified as uninsured. As the Court of Appeals noted, this requires the insured to determine whether he or she has suffered a threshold "serious impairment" injury as defined under MCL § 500.3135(1), and:

> An insured may not have sufficient time to ascertain whether an impairment will affect his ability to lead a normal life within one year of an accident. Indeed, three of the factors to be considered in determining whether a serious impairment exists are the duration of the disability, the extent of residual impairment, and the prognosis for eventual recovery.
>
> *Rory*, *supra*, 262 Mich App at 686; citing *Kern v Blethen-Coluni,* 240 Mich. App. 333, 341; 612 N.W.2d 838 (2000).

Moreover, the fact of an accident causing a "serious impairment" injury is still insufficient to trigger accrual of a claim for uninsured motorist benefits until the insured reasonably should become aware that the tortfeasor is not covered by the insurance that every Michigan automobile owner is presumed to carry in compliance with Michigan law:

> The report of the accident that the no-fault claim procedure requires could not inform the insurer of the most obviously necessary fact to trigger uninsured motorist coverage, namely, that in the insured's view the tortfeasor was uninsured. Thus, ... this mere report of an accident would not give it the basis to conclude that the tortfeasor, in violation of the statute that requires automobile insurance be carried, MCL 257.518, MCL 500.3009, MCL 500.3131; MSA 9.2218, 24.13009, 24.13131, did not have automobile no-fault insurance. Thus, it could not have had the information necessary to deny a claim for uninsured motorist benefits.
>
> *Morley v Auto Club of Michigan*, 458 Mich 459, 468 (1998)

An insured accident victim, like his or her insurer, would have no way to know that a third-party tortfeasor is uninsured in violation of the law merely because an accident occurred. As a practical matter, this knowledge is unlikely to materialize until litigation commences and either a default enters because there is no insurer to defend the tortfeasor or the plaintiff is able to compel discovery of the tortfeasor's insurance information pursuant to MCR 2.302(B)(2) and MCR 2.313(A). Consequently, the fact that a tortfeasor is uninsured is not likely to emerge until after a lawsuit is filed and served, and only then does a claim for uninsured motorist benefits properly accrue.

Indeed, the definition of "uninsured motorist" in the Continental policy specifically contemplates the possibility that the uninsured status of the tortfeasor will not become apparent until a later stage in the proceedings. The term "uninsured motor vehicle" is defined to include a vehicle:

> To which a bodily injury liability bond or policy applies at the time of the accident but the bonding or insuring company:
>
> (1) Denies coverage; or
>
> (2) Is or becomes insolvent.
>
> Appellant's Appendix, p. 7a.

There is nothing to prevent a third-party insurer from denying coverage more than one year after the accident, and an insolvency could occur after the underlying tort case is tried and reduced to a judgment. Consequently, it is highly unlikely that a claim for uninsured motorist coverage under this provision would accrue within the one-year contractual limitation, but there is no provision in the contract for bringing such a claim once it does accrue.

In summary, a contract claim for uninsured motorist benefits cannot properly accrue until the plaintiff has reason to believe that he or she is legally entitled to recover compensatory damages from a motorist who is identifiably uninsured, such that "all of the elements of the cause of action have occurred and can be alleged in a proper complaint." *Connelly v Paul Ruddy's Equipment Repair & Service Co,* 388 Mich. 146, 150 (1972). Given the need to assess satisfaction of the "serious impairment" threshold, as well as demonstrating that the tortfeasor was uninsured at the time of the accident under the terms of the Continental policy, the prospects for accruing a claim within one year after the accident are suspect at best.

3. The Court Of Appeals Properly Determined That The One-Year Limitation In The Continental Policy Was Unreasonable, And The Remedy Fashioned By The Court Of Appeals Was Appropriate.

The Court of Appeals below properly found that the one-year contractual limitation period in the Continental policy was unreasonable under the rule as articulated in *Timko*, *Herweyer, and Camelot*:

> [W]e conclude that the limitation here is not reasonable because, in most instances, the insured (1) does not have "sufficient opportunity to investigate and file an action," where the insured may not have sufficient information about his own physical condition to warrant filing a claim, and will likely not know if the other driver is insured until legal process is commenced, (2) under these circumstances, the time will often be "so short as to work a practical abrogation of the right of action," and (3) the action may be barred before the loss can be ascertained.
>
> *Rory*, *supra*, 262 Mich App at 686.

This renders the limitation period unenforceable and requires the court to construe the contract "in a *reasonable* manner so as to avoid forfeitures arising from failure of a beneficiary to perform an impossible act." *Lukazewski, supra*, 270 Mich at 419 (emphasis added). A constellation of factors works to support the ultimate decision of the Court of Appeals to borrow the three-year statutory limitation period applicable to automobile negligence claims.

In *Morley*, the Court found that a three-year contractual limitation period mimicking the statutory limitation period established by the legislature for automobile negligence actions was enforceable, particularly given that the insured had received affirmative notice of the uninsured status of the tortfeasor more than three years before filing an amended complaint that included the uninsured motorist claim. *Morley*, *supra*, 458 Mich at 462-64.

Our previous case law has observed that a contract for uninsured motorist coverage, although voluntary, is a substitute for a legislative remedy in which "the insurer promises the insured that his right of action for greater than threshold injuries will not be worthless if the tortfeasor turns out to be uninsured." *Bradley*, *supra*, 409 Mich at 63. Consequently, the contractual remedy is best viewed and construed in light of the statutory remedy for which it stands in substitution. *Id.*; see also, *Auto Club Ins Ass'n v Hill*, 431 Mich 449, 458-66 (1988) (applying statutory threshold to voluntary contractual actions).

The Court of Appeals also recognized the importance of the message conveyed in *Herweyer* that uncertain limitation periods are disfavored, and that the statutory limitation period established by the legislature is "a straightforward and objective indicator of what period is reasonable." *Rory*, 262 Mich App at 687; *Herweyer*, 455 Mich at 22-23, citing *Lothian v Detroit, 414 Mich 160, 165 (1982)*. As indicated in *Herweyer*, the appropriate remedy is to "borrow" the most suitable statute or other rule of timeliness, instead of trying to determine reasonable limitation periods on a case-by-case basis. *Herweyer*, 455 Mich at 23-24, citing *DelCostello v Int'l Brotherhood of Teamsters,* 462 U.S. 151, 158 (1983). Similar logic has prevented application of a discovery rule of accrual to extend the limitation beyond the statutory three-year period. *Sallee v Auto Club Ins Ass'n*, 190 Mich App 305, 307-08 (1991).

Given that the insured must sue the other driver within three years of the injury, whether or not the insured has sufficient information to know if a serious impairment has been sustained, *Stephens v Dixon, 449 Mich. 531 (1995)*, and whether or not the other driver is insured, the *Rory* panel appropriately concluded that the three-year statutory period applicable to automobile negligence actions under MCL § 600.5805(10) would not deprive the insured of a sufficient

opportunity to investigate and file a claim and would not work a practical abrogation of the right. *Rory*, 262 Mich App at 687.

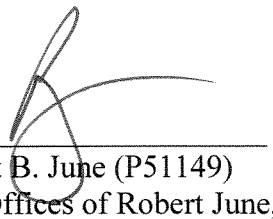
In its argument, Continental does not claim any substantial prejudice, and it does not appear that the modification created by the Court of Appeals would create any substantive prejudice to Continental. Rather, Continental merely urges the Court to adopt a strict rule that a contractual limitation period inserted into its contract must be enforced even if it is unreasonable to do so. Such a rule would run contrary to the public policy of Michigan, established through "definite indications in the law," and the Court of Appeals properly rejected this request.

Therefore, given these considerations, the Court of Appeals correctly remedied the unreasonable contractual limitation in the Continental policy by borrowing the statutory three-year limitation period applicable to automobile negligence causes of action, and thus construed the insurance contract "in a reasonable manner so as to avoid forfeitures arising from failure of a beneficiary to perform an impossible act." *Lukazewski*, *supra*, 270 Mich 415, 419. Consequently, it would be appropriate for this Court to affirm the decision of the Court of Appeals in this matter, remanding this action to the trial court for further proceedings.

IX. CONCLUSION AND REQUEST FOR RELIEF

For all of the reasons stated above, Amicus Curiae Michigan Trial Lawyers Association respectfully requests this Honorable Court to deny the appeal of Defendant-Appellant Continental Insurance Company and to remand this action to the trial court for further proceedings.

Respectfully submitted,



Robert B. June (P51149)
Law Offices of Robert June, P.C.
Attorney for Amicus Curiae
Michigan Trial Lawyers Association
124 Pearl Street, Suite 201
Ypsilanti, Michigan 48197-5374
(734) 481-1000

Dated: February 2, 2005